

MEMORANDUM


State of Alaska Department of Law

To: Honorable Loren Leman
Lieutenant Governor

Date: August 1, 2005

File No.: 663-05-0239

Tel. No.: 465-3600


From: Sarah J. Felix
Assistant Attorney General
Labor and State Affairs – Juneau

Re: Initiative application re: Alaska
video lottery law (05LOT2)

I. INTRODUCTION AND SUMMARY

You have asked us to review an application for an initiative petition for an Act entitled "Alaska Video Lottery Law." We have completed our review and find that the application does not comply with the constitutional and statutory provisions governing use of the initiative.

This initiative petition is similar to an initiative petition submitted earlier this year for a proposed bill also entitled "Alaska Video Lottery Law." We reviewed the earlier initiative application and recommended that you deny certification of that application in 2005 Inf. Op. Att'y Gen. (Apr. 19; 663-05-0177).

The sponsors have made changes to the bill to be initiated in the current application; however, these changes are not sufficient to remedy the deficiency in the bill that we identified in our review of the earlier, similar initiative application. The proposed bill still contains local and special legislation, which is prohibited from the initiative by the Alaska Constitution, art. XI, sec. 7.

Under these circumstances we recommend that you do not certify the application.

II. SUMMARY OF THE PROPOSED BILL

The bill proposed by this initiative application is 16 pages long, and is divided into two sections. Section 1 sets out the bill's title, "Alaska Video Lottery Law." Section 2 adds new sections, designated AS 05.15.700 through AS 05.15.716, to the Alaska Statutes, article 5, chapter 15. As explained above, the bill proposed is similar to a bill submitted earlier this year, therefore, we refer you to our earlier review memorandum for a detailed summary of

the prior bill's provisions. We will summarize the changes set out in the current proposed bill in this memorandum.¹

The current video lottery initiative would add a new category of permissible gaming called "restricted gaming operations," in addition to the new forms of gaming allowed by the original video lottery initiative. Restricted gaming operations would be conducted in a "restricted eligible facility" in which "restricted gaming operations" are conducted by a "restricted licensee" in a "designated VLT area" as defined in proposed AS 05.15.701(3). References to restricted gaming operations are set out throughout the definitions section in proposed AS 05.15.701(5), (12), (13), (15), (16), (18)—(26), and (29), and throughout the rest of the proposed bill.

The term "Restricted VLT Gaming Operations" is defined in proposed AS 05.15.701(24) as the operation of no more than 5 video lottery terminals by a restricted licensee. Restricted gaming operations are to be conducted in any borough, or "restricted special districts," which are defined in proposed AS 05.15.701(25) as specific census areas. These census areas are Aleutians West, Bethel; Dillingham; Nome; Prince of Wales-Outer Kechikan; Skagway-Hoonah-Angoon; Southeast Fairbanks; Valdez-Cordova; Wade Hampton; Wrangel-Petersburg; and Yukon-Kuyukuk.² Under proposed AS 05.15.701(19), in order to conduct restricted gaming operations, the department must authorize the operation, the voters in the area must approve the restricted gaming operations, and the proposed restricted licensee must either hold a liquor license or a charitable gaming license. Under proposed AS 05.15.701(20), the applicant for a restricted license must either own, hold an option to purchase, or hold a lease on a restricted acceptable parcel, and cannot hold a license for unrestricted VLT operations.

The initiative retains most of the provisions from the earlier initiative on licensure of VLT operations. This type of license to operate video lottery terminals can only be issued by the state to an "eligible applicant." An eligible applicant is defined as a person who owns an "acceptable parcel" within a "gaming district." AS 05.15.701(6). An acceptable parcel is defined as being at least 10 acres in size and not within 75 miles of an eligible facility.³ AS 05.15.701(1). Gaming district is defined initially to mean a specific parcel of land in Anchorage that is located east of Minnesota Drive and north of Raspberry. AS 05.15.701(8).

¹ Staff from the Commercial section of our office have assisted in preparing the summary of the bill to be enacted by this initiative as gaming is a specialized area of law, handled by that section.

² We note that the spelling of the names of various communities set out in this section of the bill to be initiated is incorrect. The correct spellings are Wrangell-Petersburg, Prince of Wales-Ketchikan, and Yukon-Koyukuk.

³ The prior bill had included a 50 mile limitation in place of the current 75 mile limitation.

We understand that this parcel of land is owned by an individual. Gaming district is also defined to include other parcels designated by the Department of Revenue after approval by a majority of the voters in the borough in the proposed gaming district would be located. The initiative permits no more than one gaming district per borough. AS 05.15.707(h).

In the prior version of the bill proposed AS 05.15.701(8) had contained another limitation on establishment of additional gaming districts in the state. In the prior bill, additional gaming districts could not be established until after December 31, 2008. The current version of the bill removes this limitation. The prior bill also required a statewide vote in order to establish additional gaming districts. The current bill requires only a local vote of the borough in which the gaming district is proposed to be located. However, the current bill imposes a new limitation on the establishment of additional gaming districts for unrestricted VLT operations in proposed AS 05.15.707(3)(h). Under this revised provision, unrestricted gaming districts are allowed only in communities that have a population in excess of 30,000.

The extraordinarily restrictive definition for VLT licensure means that initially the only person that could possibly be issued a license to operate video lottery terminal gaming operations is the individual who owns the identified parcel of land or a subsequent owner of the identified parcel of land. The addition of the new class of license for restricted VLT gaming operations does not alter this result. While there is broader eligibility for the restricted license, the extremely limited scope of these restricted licenses allowing only five or less VLTs does not mitigate the local and special nature of the provision for granting the first and only VLT license in Anchorage set out in the proposed bill. The other change in the bill, removal of the delayed effective date for establishment of other gaming districts, to allow other entities the opportunity to sooner obtain a VLT license in other parts of the state, is also insufficient to alter the local and special nature of the bill to be initiated. These changes do not alter the fact that a special privilege is being granted to one landowner in Anchorage.

As we explained in our earlier memorandum the initiative provides a licensing procedure in AS 05.15.703. Licenses to operate video lottery terminals shall last for ten years and are subject to automatic renewal. AS 05.15.703(4). Restricted licenses to operate restricted gaming operations shall last for five years and are subject to automatic renewal. AS 05.15.703(10).

As noted in our prior memorandum the initiative imposes a tax upon the net proceeds from the video lottery terminals. The new initiative makes this tax applicable to restricted licensees as well. There is a 17 percent tax that is to be paid on a monthly basis to the state. AS 05.15.704(a). A restricted licensee is entitled to reimbursement from this tax for sums advanced under AS 05.15.703. There is also an eight percent tax that is to be paid on a monthly basis to the borough in which the video lottery terminals are operated. AS 05.15.704(b).

We noted in our earlier memorandum reviewing the first video lottery initiative application that the drafters of the initiative had placed the new provisions in chapter 15 of AS 05, which governs charitable gaming. We questioned whether the drafters had thereby signaled an intention for the existing provisions of AS 05.15 to also govern the provisions of the initiative so that all net proceeds from the video lottery terminals would need to be used for the purposes set forth in AS 05.15.150. We also questioned whether the expense limitations of AS 05.15.160 and the prize limitations of AS 05.15.180 would apply to the operation of video lottery terminals. Apparently in response to these questions the sponsors have added a new subsection (d) to proposed AS 05.15.716, stating that the provisions of AS 05.15.150, AS 05.15.160, and AS 05.15.180 are not applicable to the bill to be initiated, to VLT Gaming Operations, or to Restricted VLT Gaming Operations.

III. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

A. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

The application meets the first three requirements. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

B. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects -- dedication of revenue, appropriations,

the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation -- are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.⁴

In proposed AS 05.15.701(8), the definition of "gaming district" sets out a specific parcel of property as the first gaming district in the state. No other gaming district may be established in the state until after a vote of approval by a majority of the voters in the borough in which the proposed gaming district would be located. The specific parcel described in proposed AS 05.15.701(8) is a 670,824 square foot vacant lot near the intersection of Minnesota and Raspberry Road, in Anchorage, owned by an individual. Proposed AS 05.15.707(3)(h) imposes an additional limitation allowing only one gaming district per borough. Proposed AS 05.15.701(1) imposes another limitation that gaming facilities may not be located within 75 miles by road of one another. So, AS 05.15.701(8) in combination with AS 05.15.707(3)(h) and AS 05.17.701(1) essentially identifies one specific parcel as the sole gaming district in the Anchorage borough.

However, the Alaska Constitution and the Alaska Statutes clearly prohibit the use of the initiative to enact local and special laws. The Alaska Constitution, art. XI, sec. 7 provides that "the initiative shall not be used to...enact local or special legislation." Similarly, AS 15.45.010 provides that "an initiative may not be proposed to...enact local or special legislation."⁵

As explained above, the bill to be initiated concerns local and special legislation, a prohibited subject, and therefore fails to satisfy the fourth requirement of AS 15.45.040. As

⁴ Although not at issue here, we have also consistently advised that constitutional amendments are also a prohibited subject. *Starr v. Hagglund*, 374 P.2d 316, 317 n.2 (Alaska 1962). Recently, the Alaska Supreme Court issued a decision in *Trust the People v. State*, 2005 WL 1297915 (May 27, 2005) that raises questions about the permissible scope of pre-election review of certain implied constitutional restrictions on the use of the initiative. Although the issue presented in *Trust the People* is not an issue with regard to the video lottery initiative, we note that we have analyzed the Court's apparent narrowing of the scope of pre-election review in 2005 Inf. Op. Att'y Gen. (Jul.1; 663-05-0225).

⁵ The treatise 2 N.Singer, *Sutherland Statutes and Statutory Construction*, sec. 40.01 (5th ed.1993), cites *Boucher v. Engstrom*, 528 P.2d 456 (Alaska 1974) for the proposition that constitutional prohibitions such as article XI, section 7 of the Alaska constitution were enacted to limit the practice of enacting special legislation to prevent abuse of the legislative process by picking favorites. The provision of the bill to be initiated that designates a specific parcel of land for the sole gaming district in Anchorage is an example of legislation used to pick a favorite, or confer a special privilege. See also *Cities Service Co. v. Maryland*; 431 A.2d 663, 673 (Md. 1981).

you know, the lieutenant governor is obligated to assure that a proposed initiative does not violate the restrictions of article XI, section 7 of the Alaska Constitution. *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996).⁶ The details of our analysis explaining that the bill to be initiated would violate the restriction against use of the initiative to enact local and special legislation in article XI, section 7, of the Alaska Constitution, is set out in our earlier review memorandum.

The analysis set out in our earlier review memorandum on the first video lottery initiative applies to the current version of the video lottery bill. The current bill does not adequately address the local and special legislation issue we raised in our earlier review memorandum. The proposed bill remains prohibited local and special legislation. It continues to designate a specific parcel of property as the sole gaming district in Anchorage, a matter that does not have obvious statewide impact. The addition of the restricted gaming license, deletion of the delayed effective date for creation of additional gaming districts, and substitution of a local approval vote for a statewide vote does not resolve this issue. Examining the legislative goals and the means used to advance them, there is no indication that the local and special classification created by the proposed bill bears a fair and substantial relationship to legitimate governmental purposes.⁷

⁶ The court in *Boucher v. Engstrom*, 528 P.2d 456, 460 (Alaska 1974) held that it was appropriate to determine whether the initiative at issue in that case concerned the prohibited subject of local and special legislation prior to enactment of the initiative law. The court in the recent case *Trust the People v. State*, 2005 WL 1297915 (Alaska, May 27, 2005) reaffirmed that pre-election review is appropriate to determine if an initiative concerns a subject prohibited under the Alaska Constitution, art. XI, sec. 7.

⁷ The current bill continues to fail to provide a rational basis supporting the local and special aspects of the bill to be initiated. We explained this point in our earlier memorandum as follows:

Here, there is no discernable factual basis to support the designation of the first and only gaming district in Anchorage as a specific parcel of land owned by one individual, at a specific location. The statement of purpose set out in the bill contains no explanation for the selection of this site, and we are unaware of any reason to support the designation in the proposed bill of one particular parcel of land, owned by a single individual, as the first and only gaming district in Anchorage. The bill proposed here is like the act struck down in *Abrams v. State*, 534 P.2d 91 (Alaska 1975) because it provides a method of creating a new gaming district which is peculiar to the locality where it is applicable, and the subject matter (creation of the sole gaming district in Anchorage by

C. Conclusion

For the above reasons, we find that the proposed bill is not in the proper form, and therefore recommend that you do not certify this initiative application.

If you decide to reject the initiative, we suggest that you give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will set in motion a 30-day appeal period during which these persons must contest your action or be forever barred. *McAlpine v. University of Alaska*, 762 P.2d 81, 86 (Alaska 1988).

Please contact me if we can be of further assistance to you on this matter.

SJF:nfp

cc: Laura Glaiser, Director
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Office of the Lieutenant Governor

Mike Barnhill, Assistant Attorney General
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designation of a specific parcel of land owned by one individual)
cannot be said to be of statewide interest or impact.

...

[T]he initiative at issue here does not provide a factual record demonstrating that there are unique characteristics of the parcel of land identified in the bill for Anchorage's sole gaming district. Likewise, the proposed bill contains no findings expressing legitimate purposes for selecting a particular parcel for Anchorage's gaming district. Further, there appears to be no connection between selection of the particular parcel, and the state interests identified in the "purpose" section of the proposed bill.